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November 9, 2011

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association (“ACA”) Notice of Ex Parte Presentation; *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93

Dear Ms. Dortch:

On November 7, 2011, Ross Lieberman, ACA, and the undersigned, Thomas Cohen of Kelley Drye & Warren LLP, met with the following Commission staff from the Media Bureau – Michelle Carey, Mary Beth Murphy, Shabnam Javid, Nancy Murphy, Lyle Elder, and Krista Witanowski – and Enforcement Bureau – Eloise Gore. The purpose of the meeting was to continue to discuss with the Commission staff implementation of the CALM Act, especially as it affects smaller multichannel video programming distributors (“MVPDs”), who are ACA members. ACA appreciates that the Commission staff recognizes that smaller MVPDs have unique capabilities and business relationships that need to be taken into account as the Commission adopts regulations implementing the statute.

Since the outset of this proceeding, ACA has submitted that ATSC A/85 only requires MVPDs that pass through advertisements inserted upstream by programmers to properly transmit the dialnorm metadata and notify programmers if they receive complaints that these advertisements are loud.¹ While it supports the proposal by the National Cable & Telecommunications Association

¹ As ACA noted in its October 24, 2011 *ex parte*, ATSC A/85 is designed to cover the entire ecosystem of entities involved with loudness management in video programming, including:

- Producers of programming and commercial advertisements
- Programmers aggregating a variety of content and sending it to local distributors

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(“NCTA”) regarding “Network-Provided” commercials, in which larger MVPDs volunteer to have the Commission impose testing obligations upon them,² ACA’s support is based on its desire to seek and provide a compromise with the Commission’s overly expansive reading of the standard. To apply the testing requirements in the NCTA proposal to smaller operators to enable these MVPDs to qualify for a safe harbor regarding advertisements inserted upstream by programmers exceeds the

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- Television broadcasters and MVPDs distributing a wide variety of programming channels
 - Consumer electronics firms building and selling customer premises equipment which decodes metadata in programming transmission.

Each of these participants has a crucial role in the ATSC A/85 ecosystem; yet, the CALM Act only seeks to incorporate the ATSC A/85 standards insofar as they apply to broadcasters and MVPDs. The statute does not permit the Commission to overreach and impose additional obligations on broadcasters and MVPDs (those not specifically mandated of them in ATSC A/85) in an attempt to prevent loud commercial advertisements.

For instance, there are approximately 7,500 cable systems, most of which distribute the same feeds of several hundred programming channels to consumers. The authors of ATSC A/85 understood that it was costly and duplicative to have each of these 7,500 systems install and utilize equipment to monitor and correct the loudness of commercial advertisements inserted in several hundred programming channels upstream. Instead, the standard establishes a much more efficient process whereby programmers are directed to insert the commercial advertisements correctly and the 7,500 cable systems are required to pass through the signal without alteration.

² See *Ex Parte* of the National Cable & Telecommunications Association, MB Docket No. 11-93 (Oct. 18, 2011). Under the NCTA proposal, all MVPDs must ensure their equipment passes through dialnorm metadata pursuant to A/85 in the transmission of digital program networks, including the transmission of commercial advertisements inserted by the programmer. By meeting this requirement, MVPDs with fewer than two million total subscribers would be protected by the safe harbor provision. For MVPDs with more than two million total subscribers, to be protected by the safe harbor provision, they would need to perform additional testing and meet other requirements. The proposal also enables an MVPD to meet the safe harbor provision by relying on a certification from a program network that it is in compliance with A/85. Finally, NCTA proposes that the Commission only forward complaints to MVPDs when they evidence a potential pattern of non-compliance and that the MVPD will forward the complaints to the relevant programmer if it is relying on certification from that programmer.

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requirements of the standard. Moreover, any additional benefit of extending the obligations beyond larger MVPDs would be negligible since programmers distribute the same programming feed containing their inserted commercials to all MVPDs, large and small alike.³

With respect to commercials inserted by smaller MVPDs, either on their own or by using third party vendors, ACA recognizes that ATSC A/85 imposes greater responsibilities on these MVPDs and submits the Commission adopt the following safe harbors, which are consistent with the statute and standard:

- Smaller MVPDs that insert their own advertisements without use of a third party vendor would be subject to the Act's safe harbor provision if they installed, maintained, and utilized in a commercially reasonable manner equipment compliant with the Commission's regulations.⁴
- For smaller MVPDs that use a third party vendor, a safe harbor would be initially available to avoid forfeiture for non-compliance if they had obtained a certificate from the vendor that the vendor has installed and thereafter maintained and utilized its equipment in a commercially reasonable manner compliant with ATSC A/85.

Mr. Lieberman focused the initial discussion in the meeting on a survey ACA conducted of its membership in the past week about their practices in passing through network programming signals and inserting commercial advertisements. The results of this survey provide a sound basis for the policies ACA has proposed to date in the above-referenced proceeding and for those propounded in this meeting. Approximately, 25 percent of ACA's members responded to the survey, a substantial sampling,⁵ which demonstrates their interest in and concern with the Commission's implementation of the CALM Act. Of those responding, 47 percent do not insert commercial advertisements, and, for those inserting advertisements, 75 percent use a third party vendor.⁶ Finally, almost 85 percent do not

³ ACA also supports NCTA's proposal because it properly recognizes that the vast majority of smaller MVPDs are not capable of monitoring programming feeds where they do not insert commercial advertisements.

⁴ ACA has urged the Commission to provide waivers for smaller MVPDs to give them time to come into compliance and continues to support that proposal.

⁵ 45 percent of ACA members responding indicated that they had less than 2,000 subscribers, 34 percent said they had between 2,000 and 9,999 subscribers, 13.5 percent indicated they had between 10,000 and 49,999 subscribers, and 5 percent said they had more than 50,000 subscribers. 2.5 percent of respondents did not reveal their subscriber numbers.

⁶ Some ACA members both use a third party and insert their own advertisements.

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have a device (such as a Dolby LM 100 Broadcast Loudness Meter) enabling them to measure the perceived loudness of programming. Of the 15 percent of ACA's members that own a device, significantly more are ACA's larger members. In sum, these results indicate that:

- (1) Because of their limited resources and capabilities, many hundreds of smaller MVPDs will be especially affected by the new regulations,
- (2) Half of ACA's members do not insert any commercial advertisements and, when they do, they largely rely upon third party vendors, and
- (3) Smaller MVPDs generally lack both the equipment and expertise to monitor programming feeds for loudness, record the audio and video of these feeds, and match the audio and video.⁷

With these factual predicates, ACA submitted the following proposals – consistent with its support for the compromise proposal submitted by NCTA -- to implement the statute and the resolution of complaints:

- If complaints filed with the Commission indicate a pattern or practice that advertisements inserted upstream by a national or regional programmer are not compliant with the loudness directives in ATSC A/85, the Commission would send a Letter of Inquiry ("LOI") only to the largest MVPD that is the subject of the complaints to address the matter. This reflects both the fact that it is much more efficient to have the programmer address the problem and that the largest MVPD is more likely to obtain a satisfactory response from the programmer. To qualify for a safe harbor and avoid liability under the NCTA proposal, the largest MVPD then could conduct testing and notify the programmer. Should a smaller MVPD receive a LOI from the Commission, to avoid liability the MVPD would need to demonstrate that it informed the programmer and sought a written response. No smaller MVPD would be required to conduct testing as a condition to avoiding liability.⁸ Finally, an MVPD would be obligated to respond to the Commission about the measures it has taken in response to the complaint, including any response it has received from the programmer.

⁷ ACA also notes that, to the best of its knowledge, there are no third parties that provide these services or no ACA members that share equipment.

⁸ The MVPD would need to demonstrate that it is properly passing through the programming, but this could be accomplished by attesting that owns and is properly utilizing the digital transmission equipment.

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- If complaints filed with the Commission indicate a pattern or practice that advertisements inserted regionally or locally in programming for multiple MVPD systems by a third party vendor are not compliant with the loudness directives in ATSC A/85, the Commission would send a LOI to each MVPD that is the subject of the complaints to address the matter. If the MVPD has a certificate from the relevant third party vendor that it is using equipment meeting the statute's safe harbor provision, the MVPD will not be subject to liability under the Act for the initial LOI.⁹ However, the MVPD would be obligated to notify the third party of the complaints and make reasonable efforts to get the third party to remedy the problem. The MVPD would be obligated to inform the Commission of the specific steps it has taken to address the complaint, including the steps taken by the third party to address the problem. If the initial problem is not remedied and a pattern and practice of complaints persists, the Commission would send an MVPD a second LOI, and the MVPD would be liable for violating the Act if the third party was shown to not meet the safe harbor requirements.
- If complaints filed with the Commission indicate a pattern or practice that advertisements either passed through or inserted by a single MVPD are not compliant with the loudness directives in ATSC A/85, the Commission would send a LOI to the MVPD that is the subject of the complaints to address the matter. For programming that is passed through, to avoid liability the MVPD would need to demonstrate that it was properly passing through all dialnorm metadata and notify the programmer of the problem. For advertisements inserted by the MVPD, to avoid liability it would need to demonstrate that it meets the statute's safe harbor of installing, maintaining, and utilizing equipment in a commercially reasonable manner compliant with ATSC A/85. For advertisements inserted by a third party, to avoid liability it would need to provide a certificate from the third party that is within the safe harbor. However, the MVPD would not avoid liability if the third party did not remedy any problem, complaints persisted, and the third party was shown to not meet the safe harbor requirements.

In closing the meeting, Mr. Lieberman noted that ACA appreciates the work of the Commission staff in seeking to address the concerns of smaller MVPDs and stands ready to respond to any issues raised by the Commission as it seek to adopt regulations to implement the statute.

⁹ It also may be appropriate to employ NCTA's proposed "testing" safe harbor in this instance.

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This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,



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